IN THE

Supreme Court of the United States

October Term, 1977

No. 77-952

GROUP LIFE AND HEALTH INSURANCE COMPANY, also known as BLUE SHIELD OF TEXAS, *et al.*,

Appellants,

against

ROYAL DRUG COMPANY, INC., doing business as ROYAL PHARMACY OF CASTLE HILLS and DISCO PRESCRIPTION PHARMACY, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* FOR DISTRICT COUNCIL 37 HEALTH & SECURITY PLAN and NEW YORK CITY DISTRICT COUNCIL OF CARPENTERS WELFARE FUND

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Trustees of the District Council 37 Health & Security Plan and the Trustees of the New York City District Council of Carpenters Welfare Fund respectfully submit this brief as *amici curiae* in support of the appellant Group Life and Health Insurance Co. ("Appellant Group Life").*

* Both the Appellant Group Life and the appellees have filed their written consent to the submission of briefs *amicus curiae* before this Court.

Interest of the *Amici*

The District Council 37 Health & Security Plan (the "Plan") and the New York City District Council of Carpenters Welfare Fund (the "Fund") are both collectively bargained trusteed employee welfare benefit plans within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1002(1). In addition to the usual range of welfare benefits which are characteristic of trusts of this nature, both the Plan and the Fund provide a prescription drug benefit to their covered employee members and their dependents. The prescription drug benefits they respectively provide are self insured and administered in ways which bear similarities to the prescription drug insurance issued and administered by the Appellant Group Life.

The sweep of the language found in the decision of the Fifth Circuit in this case may call into question the ability of the *amici* to continue to provide a low cost prescription drug benefit to their covered members and may, in addition, call into question the ability of the *amici* to provide or continue to provide other "pre-paid" health and health related benefits to those same covered members and their dependents.

Relevant Issues Which May Not Be Adequately Presented by the Parties

The *amici* have a special interest and posture with respect to the subject matter underlying this appeal which may not be adequately brought out by the parties. The parties to this proceeding and the Court below have focused narrowly on the issue whether or not the activities com-

plained of are insulated from the anti-trust prosecution by the provisions of the McCarran-Ferguson Act, 15 U.S.C. §1011, *et seq.* ("McCarran Act"). Indeed, the question as framed and presented to this Court is limited to whether the business of insurance, for the purposes of the McCarran Act exemption, includes contracts entered into by an insurer with a third party who provides benefits to the insurer's policy holders.

This narrow issue, however, appears to assume that the complained of underlying conduct, constitutes "monopolistic or coercive activities in health provider industries." If that assumption is not brought into question, examined and rejected in this review of the decision below, it may have serious and negative implications for self insured employee welfare benefit plans, such as the *amici,* which, in their own individual ways, are seeking to reduce the cost of health-related services needed by their members.

None of the briefs heretofore submitted in this case deals with the question of whether the "group buying" activities of employee welfare benefit plans constitutes "monopolistic or coercive activities." None of the said briefs analyzes the nature and purpose of the anti-trust laws and relate that nature and purpose to the essential relationships and characteristics of a union with respect to its members. Nor are any of the parties to this case in a position to adequately brief and discuss the special relationship which causes the trustees of collectively bargained employee welfare benefit plans to engage in the group buying of prescription drugs and whether that group buying activity could possibly constitute "monopolistic or coercive" conduct within the meaning of the anti-trust laws.

According to the best available statistics there are more than 900 employee welfare benefit plans which serve more than 7 million persons and provide a prescription drug benefit substantially similar to that here in issue. These employee welfare benefit plans may not be deemed to be engaged in the business of insurance* and may not be entitled to avail themselves of the McCarran Act exemption. Their activities in providing low-cost health related benefits to their members may be seriously and adversely affected if this Court does not reject the imputation of the Fifth Circuit, that the conduct of the Appellant Group Life in this case can be deemed a violation of the anti-trust laws.**

It is the purpose of the brief submitted herewith to concentrate attention on those issues which may be unique to the *amici,* and the class they represent. The brief is intended to bridge the lacuna found in the presentation of the parties to date, which does not treat with the ramifications of this case upon the entire scheme of health provider services structured by the major employers and labor unions of this nation through trusteed employee welfare benefit plans.

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* See 29 U.S.C. §1144(b)(2)(B).

** Indeed, the operation and conduct of State Medicaid drug programs, to the extent that they are administered by cities and other political subdivisions, may well be affected by the Court's decision in this case, since they too employ substantially the same reimbursement method and participating pharmacy system as does the Appellant Group Life and, as will be shown, the *amici.* See *City of Lafayette, La.* v. *Louisiana Power & Light,* 98 S. Ct. 1128 (1978).

Statement of Case

Both the Plan and the Fund are trusteed employee welfare benefit plans established in accordance with numerous collective bargaining agreements entered into between the various constituent local unions of the District Councils involved and the employers of the employees they represent as the collective bargaining agent.

Both the Plan and the Fund serve precisely the same purpose. They receive the employer contributions provided for in the collective bargaining agreements and use those sums to provide welfare benefits tailored by their respective trustees to meet the needs of their covered members.*

The benefits provided fall into the usual categories associated with trusts of this nature. Covered members, in accordance with the rules of the relevant trust, are provided death and disability benefits as well as reimbursement for dental, optical, hospitalization, surgical, major medical and prescription drug expenses. Gainsaid, the status and character of the prescription drug benefit ("Drug Benefit") will be the primary focus of this brief.

Both the Plan and the Fund provide a Drug Benefit to their covered members which reimburses the members for their out-of-pocket cost in purchasing prescription drugs to the extent that out-of-pocket cost does not exceed the

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* The Plan provides benefits to approximately 300,000 persons and the Fund to approximately 45,000 persons.

"average wholesale price"* of the prescription drug in question plus, in the case of the Plan, the sum of $1.25 and, in the case of the Fund, the sum of $2.00. Any covered member of the Plan or Fund may obtain this reimbursement by filing a claim, on the forms provided, after he or she has filled and paid for the prescription at a pharmacy of his or her own choosing.

In addition to this form of direct reimbursement for drug costs incurred by covered members, both the Plan and the Fund, on behalf of their covered members and in order to further assist them in adjusting to their ever increasing health care costs, have entered into agreements with pharmacies under which the pharmacy agrees to provide the prescription drug to the covered member at a charge set by reference to a pricing formula. In the event that the benefit provided to the covered member by the trust equals the pricing formula, the covered member can fill his or her prescription without any out-of-pocket cost since the pharmacy will look to the trust for its entire payment. In the event that the benefit provided to the covered member by the trust is less than the pricing formula, the covered member can fill his or her prescription by paying the pharmacist the difference between the dollar amount of the benefit and the pricing formula; the pharmacist then looking to the trust for the balance. Any pharmacy which enters into such an agreement is known as a "Participating Pharmacy."

* The "average wholesale price" is determined by reference to DRUG TOPICS RED BOOK: *The Pharmacists Guide to Products and Prices* (Medical Econ., 1978), a book in standard usage in the pharmaceutical industry and published annually and supplemented monthly.

These arrangements are, due to the force of competition, fairly standard in operation in any given area. Consistent with the practices in the area served by both the Plan and the Fund, individual pharmacists have agreed to become Participating Pharmacies and provide prescription drugs to relevant covered members at a charge which will equal the average wholesale price of the drug in question plus the sum of $2.00 ("Pricing Formula"). Under such an agreement, a covered member of the Fund who chooses to fill his or her prescription at a Participating Pharmacy will have no out-of-pocket cost associated with the purchase since the Pricing Formula equals the amount of the reimbursement the Fund provides and which it will pay to that Participating Pharmacy.* On the other hand, a covered member of the Plan who chooses to fill his or her prescription at a Participating Pharmacy will have a $0.75 out-of-pocket cost for each prescription since the Pricing Formula exceeds the amount of reimbursement the Plan provides by sum of $0.75** (Pricing Formula = average wholesale price plus $2.00: Plan reimbursement = average wholesale price plus $1.25).

Operationally, the interrelationship between the Plan or Fund, its respective covered members and the Participating Pharmacy is simple. The Plan and the Fund each provide their respective covered members with an identification card. If the covered member chooses to fill his or

* If the covered member chooses to go to a non-participating pharmacy, this same sum will be paid directly to that covered member.

** Competition for this business is so keen that many Participating Pharmacies have posted notices saying that they voluntarily waive this $0.75 direct payment by a covered member of the Plan—notwithstanding the fact that nothing, other than their own business judgment, bars them from collecting it.

her prescription at a Participating Pharmacy the card is presented along with the prescription form. The Participating Pharmacy fills the prescription and identifies it on a charge slip. If the prescription is filled for a Fund member, the Participating Pharmacy will then give the prescription to the member, ask him to sign the charge slip, and send the executed slip to the Fund for payment.* The exact procedure is followed for Plan members except that, for reasons heretofore stated, a Plan member will pay the Participating Pharmacy $0.75 before he or she can receive his or her filled prescription.

Neither the Plan nor the Fund exclude, otherwise restrict or place any special limitation upon who can become a Participating Pharmacy. All licensed druggists are entitled to and may join the respective programs if they offer to supply prescription drugs to the relevant covered members in accordance with the Pricing Formula. There are no restrictions placed upon a Participating Pharmacy apart from its agreement to adhere to the Pricing Formula—and that agreement may be terminated by it at any time. He is not required to make home delivery or provide any special ancillary services. To the contrary, if he provides a special service, he is not barred from separately charging the covered member for each such service. On the other hand, the covered member can intelligently choose whether he or she wants to pay for such additional services or just go on the "no frills flight." The net result is that, as to this relevant class of consumer, he or she is no longer subject to the hidden costs of a "tie-in sale" of ancillary

* As a matter of practice these slips are accumulated for various periods of time and then sent to the Fund or Plan, as the case may be, for bulk payment.

services which he or she may not want to pay for. This consumer now has the ability to exercise a real and intelligent choice in the market place.

Under the rules of both the Plan and the Fund, the covered member is *not* restricted in his or her choice of druggist. Whether he or she uses a Participating Pharmacy or any other druggist, both the Plan and the Fund will pay the same amount of reimbursement benefit directly to him or for his benefit. What these Trusts have done on behalf of their beneficiary members is to help those members find places where they can maximize the fixed dollar benefit they are entitled to. This type of advice to their covered members not only supports the goals of enlightened consumerism but also represents the fulfillment of the Trustees' obligations to their covered member beneficiaries. See 29 U.S.C. §1104. See also Int. Rev. Code of 1954 §501(c)(9) and regulations thereunder.

Question Presented

Over and apart from the issue to be briefed and argued by the parties to this case—whether the McCarran Act exemption applies to the complained of activities of Appellant Group Life—a more basic question may require consideration by this Court:

> Whether the provision of low cost prescription drug services by employee welfare benefit trusts to their covered member beneficiaries through an offer made to all pharmacies on proportionally equal terms is in and of itself a violation of the anti-trust laws?

It is respectfully submitted that it is not.

POINT I

A combination of consumers for the purpose of engaging in co-operative buying to effect economies of scale by mass purchasing does not violate the anti-trust laws of the United States.

A concern for the consumer's benefit is the fundament upon which the anti-trust policy of this nation is based. It requires little citation of authority to state that the anti-trust laws seek to protect the market place from practices which Congress has determined will have an adverse impact upon the consuming public. Indeed the legislative history of the Sherman Act, 15 U.S.C. §1, conclusively establishes that concern for the consumer was the intent underlying its passage and, in enforcing that Act, "the Courts should be guided exclusively by consumer welfare and economic criteria which that value premise implies". Bork, *Legislative Intent and the Policy of the Sherman Act,* 9 J. Law & Econ., 7, 11, 47 (1966): See also Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power,* 53 Texas L. Rev. 1180, 1189 (1975).

It is the possible perversion of that intent by appellees, under the guise of this private action under the Sherman Act, which has compelled the *amici* to file this brief. The *amici* are trustees, who, on behalf of their member beneficiaries, are charged, both by contract and law, with maximizing the benefits they must provide for the exclusive use of their covered member beneficiaries. As a trust entity or as individual trustees they may not gain any special advantage for themselves in the market place. They can neither seek nor retain any economic profit. They may not and do

not compete, in any real sense, as an economic unit. They have a simple and single purpose, to wit: To hold the funds that they receive on behalf of their covered members and use that money to effect the most advantageous purchase of health related goods and services on behalf of their covered members—who are, needless to say, the ultimate consumers of those same goods and services.

In a manner of speaking, these trusts are a method by which consumers have combined to improve their purchasing power in the market place. In this age of monopolistic competition, where the vigor of competitive practice in many fields resides exclusively in the ability of purchasers to exercise countervailing power, it is only the impact of mass buying of this nature which keeps some restraint upon price rises. See, Mueller, *Anti-Trust and Economics: A Look at "Competition"*, 10 St. Louis U.L.J. 482 (1962); Galbraith, American Capitalism, Chapt. IX (rev. ed. 1956).

Amici respectfully suggest that if there exists today one single field of economic enterprise that cries out for a "countervailing power" to maintain the integrity of the competitive market, it is that area of our economy occupied by the health providers. Neither the government nor major economic units such as Appellant Group Life have been able to have any impact upon this branch of our economy, which is best characterized by its uniquely inelastic demand.

There is no substitute product for health care. A consumer cannot choose to "do without" when it comes to filling a prescription and it is for that reason that certain consumers, such as the covered members of the Plan and Fund, have chosen to express themselves in the market place as a collective entity.

This concept is neither new nor novel and, since 1962, has received approval by the courts which have addressed this question. Since that time, the courts have recognized the propriety, notwithstanding the anti-trust laws, of group buying in the form of "voluntaries", "marketing cooperatives", "consumer cooperatives", "buying groups", and other entities through which small-scale enterprises have banded together to obtain the benefits of mass purchasing not otherwise available to them individually.* *Alhambra Motor Parts* v. *F.T.C.*, 309 F.2d 213, 219-21 (9th Cir. 1962); *Tri-Valley Packing Association* v. *F.T.C.*, 329 F.2d 694, 706-9 (9th Cir. 1964); *Alterman Foods Inc.* v. *F.T.C.*, 497 F.2d 993, 999-1000 (5th Cir. 1974). See also *Wholesalers: Brains and Muscle Extend Winning Streak,* Vol. 57 No. 4, PROGRESSIVE GROCER 127 (April, 1978) ("voluntaries" and "cooperatives" accounted for more than 81% of the total wholesale grocery sales volumes in the U.S. in 1977).

Where various small enterprises, as resellers of a product, may band together for the purpose of obtaining lower prices on their purchases of that product, it would seem self evident that analogous combinations of consumers, as the ultimate user of a product, may do the same.

The *amici,* moreover, are more than a grouping of consumers randomly brought together because of the increas-

* The most recent expression of Congress' willingness to give special consideration to this type of "consumer" combination for this purpose, albeit in 1936, is to be found in 15 U.S.C. §13(b) which provides that nothing in the Robinson-Patman Act ". . . shall prevent a cooperative association from returning to its members, producers or consumers the whole or any part of the net earnings or surplus resulting from its trading operations . . ." See also remarks of Congressman Utterback at 80 CONG. REC. 9419 (1936).

ing pressures of the economic market place. They represent a group of consumers who are also bound together in fraternal association through their common membership in their respective unions. This fraternal association gives them rights and privileges which may transcend those which could inure to a randomized group of consumers. This Court, in earlier decisions, has recognized the special qualities of this type of relationship and has already suggested the essence of the doctrine that the *amici* are urging—that a union or union-related body, as the representative of its members, may exert its collective strength and economic power to obtain goods or services for those members at standardized quality and low-cost rates. *Brotherhood of R.R. Trainmen* v. *Virginia State Bar,* 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois State Bar,* 389 U.S. 217 (1967); see also *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963).

The reverse side of this precise issue—a refusal to deal—has been considered by the lower courts and decided in ways which are also supportive of the position urged by the *amici.* Since 1952, the welfare fund of the United Mineworkers has negotiated contracts with individual hospitals which fixed the *per diem* sum that could be charged to members of the welfare fund. In 1971 the welfare fund could not reach price agreement with the Webster County Memorial Hospital and accordingly threatened to restrict the hospitalization of its members in that hospital to emergency cases only. The Hospital thereupon claimed that the welfare fund's refusal to deal with it, except on a limited basis, was unlawful under the Sherman Act and an illegal boycott by the fund and its beneficiaries. It accordingly sued the welfare fund seeking appropriate relief.

The dismissal of that suit by the District Court for failure to state a cause of action was affirmed by the Court of Appeals in *Webster Cty. Mem. Hospital* v. *United Minc Workers of Amer. Welfare and Retirement Fund of 1950,* 536 F.2d 419 (D.C. Cir. 1976). The language used by the Court of Appeals in its short opinion is particularly relevant to the *amici's* position. The Court said:

> "The complaint alleges no more than that the Fund has engaged in activities Congress envisaged in enacting §302 of the Taft-Hartley Act[*]. While we do not decide a §302 fund is immune from the antitrust laws, we find nothing unreasonable in the actions of the Fund alleged here. . . .
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> "In our view, the status of the Fund is similar to that of a group buying agent negotiating a price for medical care on behalf of its beneficiaries. While such a cooperative may engage in anticompetitive behavior which runs afoul of the antitrust laws [citation] neither the mere existence of a . . . fund nor negotiations with suppliers of medical care as alleged in this case, without more, amounts to an unreasonable restraint of trade. The fact that the miners are not technically 'members' of the Fund (as in the case of a cooperative), but 'beneficiaries' of the Trust and third party beneficiaries of its contract relationships, does not undercut the reality of the situation. The Fund was established for the benefit of union members, and operates on their behalf." *id.* at 420.

The Court of Appeals recognized the realities of the case before it. It saw that the prime purpose of a trusteed

* The *amicus* Fund, similarly, is a §302 Tart-Hartley Trust.

welfare fund was to serve the health needs of its members; that in carrying out that purpose it had to negotiate and standardize the price that its members must pay, directly or indirectly, for the components of health care; and that at all times the welfare fund, as a form of "group buying agent", was exclusively serving the purposes of its members. It therefore held that the welfare fund's refusal to deal with a health care provider who refused to adhere to a standardized low-cost rate for services did not violate the Sherman Act. See also *Nankin Hospital* v. *Michigan Hospital Service,* 361 F.Supp. 1199, 1207-10 (E.D. Mich. 1973).

Surely if this reasoning is valid for the facts of the *Webster County* case, it has even greater validity when applied to the activities of the *amici.* Unlike the Mineworkers Welfare Fund, the *amici* have refused to deal with no one. They not only stand ready to directly deal with any and every pharmacy which will adhere to their cost standards, but they also allow their members free choice to deal with any pharmacy the member wishes to deal with—without any dimunition in reimbursement amount. They have merely provided an option to their respective covered members which will allow those members to cover the entire cost of their prescription drugs for the amount that the Plan* or the Fund provides as a drug cost reimbursement benefit.

Basically what the appellees in the instant case are complaining of is that the Appellant Group Life, like the *amici,* has created standards governing the price it is willing to pay

* As previously noted, members of the Plan must pay the minor sum of $0.75 out-of-pocket costs for each prescription.

for prescription drugs required by *its* beneficiary policy holders. Nothing has been offered to show that these standards are in any way arbitrary or unreasonable. To the contrary, these standards are consistent with national policy intended to hold down the medical costs which have soared proportionately higher than any other cost in the nation's economy—and, parenthetically, precisely the same standards which are used under Medicaid.

The objective of any prescription drug program is to confer a benefit upon the consumer—the precise goal of the anti-trust laws. It does not seek to injure competition or gain a competitive advantage for a related enterprise. It openly seeks merely to maximize its consumer members' power in the market place. Quite obviously, the individual consumer does not have the economic strength to obtain the benefits of quantity purchasing. This individual consumer must look to collective action to achieve the advantages of scale which are inherent in the exercise of combined purchasing power. Where that power is applied, as it is by the *amici*, in an equitable fashion available on equal terms to all retail suppliers of the product; where access to the program by sellers of drug services entails no loss; the resultant restraint on exorbitant prices has a minimal effect on competition and serves the higher goal of consumer protection—the very foundation of the Sherman Act.

POINT II

In the balancing of social equities under our anti-trust policy lesser goals must give way to the imperatives of constitutional protections and basic economic policy.

It is indeed anomalous that appellees in this case are seeking to use the Sherman Act in a way which is detrimental to the consumer—the very group that this Act was designed to protect. The Sherman Act was designed by Congress to protect the consumer by insuring that large economic entities could not crush their small competitors and achieve such a dominant position in the market place as would allow them to dictate prices to the consuming public. *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, 553-5 (1944).

The economic realities of the market place at the time of the passage of the Sherman Act are well known. The small entrepreneur in an atomized market was being threatened by the " '[t]rusts' and 'monopolies' [which] were the terror of the period" *id.* at 553. It was believed then, as it is believed now, that the consumer must be protected from these large trusts and monopolies and the Sherman Act was passed to prevent these predatory economic entities from achieving dominance.

The appellees now come before this Court and urge that the Sherman Act was exclusively passed to benefit them, small shopkeepers, and seek the relief it offers without regard or reference to the impact of such relief upon the consumer. They are in essence asking that this Court permit the use of the anti-trust laws as "a sword against the

consumer." *NBO Industries Treadway Cos., Inc.* v. *Brunswick Corp.*, 523 F.2d 262, 279 (3rd Cir. 1975), vac. other grds. *sub nom., Brunswick Corp.* v. *Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977): see also *In the Matter of Coca-Cola Company, et ano.*, Opinion F.T.C. Docket No. 8855, pp. 65-7 (April 25, 1978).

Appellees do so by urging the simplest of arguments. They claim that Appellant Group Life, on behalf of its consumer policy holders, is entering into agreements with druggists whereby standardized low prices are agreed upon, the natural consequence of which is to encourage, if not coerce, these policy holders to do business only with the aforesaid druggists. Appellees, who have refused to enter into such agreements are accordingly injured for they cannot effectively compete under these circumstances. It therefore follows, say appellees, that they, as competitors, are injured, trade is thereby restrained and the Sherman Act applies.

It is respectfully submitted that appellees are in error on all counts. First, the Sherman Act does *not* protect appellees as competitors. As this Court had occasion to reaffirm last year "the anti-trust laws, however, were enacted for 'the protection of competition not competitors', Brown Shoe Co. v. United States, 370 U.S. [294] at 320 [1962]" *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, supra,* at 488. The fact that appellees may suffer economic injury because of their inability or unwillingness to adjust to changes in the market, does not give rise to a cause of action under the Sherman Act. The Sherman Act does not shield appellees from the impact of changes in the market place nor does it protect a particular competitor's manner of conducting his business.

Second, the mere fact that there exists a contract or agreement which limits one party's ability to price its product does not in and of itself make out a violation of the anti-trust laws. As stated by Mr. Justice Brandeis as long ago as 1918:

> "[T]he legality of an agreement . . . cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918).

It is quite obvious that every contract will restrain trade since that which is contracted for is purchased at a price "fixed" by the agreement between the buyer and the seller. The essential question is whether the restraint is a reasonable one. Here the restraint established by the prescription drug plans of Appellant Group Life and the *amici* merely fixes the price at which the relevant plan will purchase

drugs. It does not fix the price at which other consumers or other plans will make their purchases. Indeed, it does not even fix the price at which its subscribers will purchase drugs since the appellees have conceded that a certain percentage of the subscribers continued to purchase from non-participating druggists. The only price the plans fixed was the price which they were willing to pay for pharmaceuticals.

Should this Court countenance the views of the appellees herein, it would impose a powerful deterrent to efforts of small, as yet unorganized, consumers to band together in order to protect their interests as well as bid fair to destroy the overall structure of co-operative purchasing devised to date for the purpose of putting a check on escalating medical costs—a right of free association which is entitled to constitutional protection. See *Brotherhood of R.R. Trainmen* v. *Virginia State Bar, supra; United Mine Workers of America* v. *Illinois State Bar, supra; N.A.A.C.P.* v. *Button, supra.*

For all of the foregoing reasons, it is respectfully submitted that the determination herein of the Fifth Circuit, that a drug prescription group plan, whether insured or not, represents a "fixing of prices" is not supported by either the facts or the decisional law; is contrary to the economic policy of our anti-trust statutes; conflicts with the actualities of the market place; and is at odds with the underlying rationale of this Court's prior decisions upholding the constitutional right of groups of citizens to band together for their social and economic betterment and protection.

Conclusion

The decision of the Fifth Circuit below should be reversed on the grounds that the conduct complained of by the appellees does not constitute a violation of the anti-trust laws.

Respectfully submitted,

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